

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7600

Investigation into: (1) whether Entergy Nuclear)
Vermont Yankee, LLC, and Entergy Nuclear Operations,)
Inc. (collectively, "Entergy VY"), should be required to)
cease operations at the Vermont Yankee Nuclear Power)
Station, or take other ameliorative actions, pending)
completion of repairs to stop releases of radionuclides,)
radioactive materials, and, potentially, other non-)
radioactive materials into the environment; (2) whether)
good cause exists to modify or revoke the 30 V.S.A.)
§ 231 Certificate of Public Good issued to Entergy VY;)
and (3) whether any penalties should be imposed on)
Entergy VY for any identified violations of Vermont)
statutes or Board orders related to the releases)

Order entered: 1/5/2011

ORDER DENYING REQUEST
FOR WITNESS LOCHBAUM TO APPEAR BY TELEPHONE

I. INTRODUCTION

On December 13, 2010, the Conservation Law Foundation ("CLF") filed a motion (the "CLF Motion") seeking leave for its witness, David Lochbaum, to appear by telephone during the technical hearings in this docket that presently are scheduled for January 11 to 14, 2011. The CLF Motion noted the unusual nature of the request, but explained that CLF's attempts to make arrangements for Mr. Lochbaum to appear in person had been unsuccessful. The CLF Motion

further represented that several of the parties in this case did not oppose the requested telephone appearance.¹

On December 20, 2010, Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. ("Entergy VY" or the "Company") objected in writing to the CLF Motion, arguing that the Vermont Rule of Civil Procedure 43(a)² and Vermont common law require that Mr. Lochbaum's testimony be taken orally before the Board absent an agreement among the parties to taking his testimony by other means.³ Entergy VY further acknowledged that a denial of the CLF Motion likely would necessitate scheduling an additional technical hearing date in order to enable Mr. Lochbaum to testify in person before the Board.

On December 21, 2010, CLF responded to Entergy VY's objection to the CLF Motion, asserting that the Company had offered no "reason why presentation by telephone is not adequate and should not be allowed."⁴ CLF emphasized that, as a non-profit, public interest organization, it frequently relies upon *pro bono* assistance from volunteer witnesses such as Mr. Lochbaum and therefore "cannot always control or demand their availability." Therefore, citing Board Rules 2.106 and 2.107,⁵ CLF urges the Board to allow Mr. Lochbaum to appear by telephone over the

1. These parties are: the Vermont Department of Public Service; the Agency of Natural Resources; the New England Coalition; Vermont Public Interest Research Group; the Vermont Natural Resources Council; the Connecticut River Watershed Council and the Windham Regional Commission.

2. Entergy VY relies on Board Rules 2.103 and 2.216(A), which provide that the Vermont Rules of Civil Procedure are applicable to Board proceedings; V.R.C.P. 43(a), which provides that "in all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules, the Vermont Rules of Evidence, or other rules adopted by the Supreme Court"; and the Vermont Supreme Court's decision in *Simpson v. Rood*, 2003 VT 39, ¶9, 830 A.2d 4, 7 (Vt. 2003), in which the Court found that the "orally in open court" language of V.R.C.P. 43(a) "leaves nothing to the court's discretion in the absence of an agreement by the parties to allow testimony in a different form."

3. Letter from John H. Marshall, Esq., on behalf of Entergy VY, to Susan M. Hudson, Clerk of the Board, dated December 20, 2010.

4. Letter from Sandra Levine, Esq., on behalf of CLF, to Susan M. Hudson, Clerk of the Board, dated December 21, 2010.

5. Board Rule 2.106 provides that the Board's rules "shall be liberally construed to secure the just and timely determination of all issues presented to the Board." Board Rule 2.107 permits the Board, in its discretion, to waive the application of its procedural rules in order to "prevent unnecessary hardship or delay, in order to prevent injustice, or for other good cause shown."

objection of Entergy VY in order to "avoid delay, prevent injustice and unnecessary hardship. . . ."

We hereby deny the CLF Motion. While at times we have permitted witnesses to appear by telephone in other cases, it is our custom to do so when there is no objection to proceeding in this manner and when the witness testimony is such that it can be easily accommodated via telephone. In this case, Entergy VY has insisted on the right to cross examine Mr. Lochbaum in person. Mr. Lochbaum appears to be a significant witness in this proceeding, with thirty-four pages of prefiled testimony along with numerous exhibits. Testimony presented over the telephone makes it much more difficult for the tribunal to assess the credibility of the witness, and might preclude or hamper the ability of opposing parties to utilize cross-examination exhibits in their questioning of the witness. In light of these considerations, we conclude that CLF has not demonstrated good cause to excuse Mr. Lochbaum's attendance in person.

We understand that CLF has attempted to secure Mr. Lochbaum's presence at the scheduled technical hearings. However, we have already afforded CLF significant procedural accommodation in this docket by postponing the original December 2010 hearing dates at its request in favor of the proceedings we have since noticed for January 11 through 14, 2011. It was incumbent upon CLF at the time the rescheduled dates were selected to ensure the availability of its testifying witnesses on those dates, or, in the alternative, to seek a modification to the schedule. Under these circumstances, we conclude that it would be unfair to accept CLF's argument, which asks us to disregard Entergy VY's objection to permitting Mr. Lochbaum to testify by telephone, when the responsibility for failing to produce Mr. Lochbaum in person rests with CLF in the first instance.

We acknowledge CLF's concern that there be no undue delay in the proceedings in this docket. Therefore, parties are advised that due to scheduling constraints facing this Board in the near term, our next available opportunity to take Mr. Lochbaum's testimony in person will be on the morning of January 24, 2011.

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of January, 2011.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/ John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: January 5, 2011

ATTEST: s/ Susan M. Hudson

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)